Onn Yee Kien & Anor (as personal representatives of the estate of Ong Ku @ Hong Poe, deceased) v On Giin Chuang

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02(NCVC)(A)-2976–12 OF 2012
MOHD HISHAMUDIN, ABDUL AZIZ RAHIM AND MOHAMAD ARIFF JJCA
24 APRIL 2013

Land Law — Caveats — Private caveat — Extension of life of — Application to extend made ex parte — Whether application to extend life of caveat should be made inter partes — Whether there were exceptional circumstances for application to be made ex parte — Whether time for expiry of caveat began to run from date of service of Form 19C Notice — Caveator — Conduct of — Whether caveator had commenced or intended to commence court action to preserve his claim to proprietary right in land — Whether legal burden to prove existence of exceptional circumstances for application to extend life of caveat being made ex parte would lie on caveator — National Land Code ss 323 & 326(2)

The dispute in the present case centred over a piece of land situated in Rawang ('the land'), which was co-owned by a husband and wife. The husband and wife had died but there existed a dispute between the beneficiaries of the estate of the late co-owners of the land that had culminated in the filing of a civil suit at the KL High Court. The respondent claimed to be a beneficiary of the estate of the late husband. However, he was not a party to the civil suit. Instead, the respondent lodged a private caveat in respect of the land so as to restrain any dealing in respect of the disputed property. The personal representatives of the estate of the late wife ('the appellants') being aggrieved by the presence of the respondent's private caveat applied pursuant to s 326(1) of the National Land Code (NLC) for the removal of the private caveat. On 28 June 2012, the Registrar of Title served on the respondent as caveator a Form 19C notice ('the notice') for the removal of the caveat. On 5 July 2012, the respondent purported to invoke s 326(2) of the NLC and filed an ex parte originating summons to extend the life of his private caveat, which would expire on 28 August 2012. On 18 July 2012, the High Court granted an ex parte order extending the life of the private caveat. On 17 August 2012, the appellants filed an inter partes application to set aside the ex parte order. The inter partes application was dismissed and hence the present appeal. The appellants submitted that an application under s 326(2) of the NLC should be made inter partes and that only in exceptional circumstances could the application be made ex parte. The appellants also argued that there were no exceptional circumstances in the present case that warranted the respondent proceeding by way of an ex parte application. The respondent argued that there were

A exceptional circumstances. According to the respondent the Notice served on the respondent on 28 June 2012 was dated 1 June 2012 and that time to apply to extend the life of his private caveat would thus begin to run from 1 June 2012.

B **Held**, allowing the appeal with costs of RM10,000:

(1) It is settled law that an application under s 326(2) of the NLC to extend the life of the caveat should be made inter partes and not ex parte unless there were exceptional circumstances. The legal burden to prove the existence of such exceptional circumstances would lie on the respondent as the caveator (see para 26).

(2) There was no ambiguity in the law or in the Form 19C Notice ('the notice') that was actually served on the respondent. The law and the Notice were crystal clear. Both provided that the two-month period began from the date of the service of the Notice on the caveator. In the present case, it was not disputed that the Notice was served on the respondent on 28 June 2012 and as such, the respondent had ample time (two months) to make the application to extend the life of the private caveat inter partes. Even if time began to run from the date of the Notice ie 1 June 2012, when the respondent filed the ex parte application on 5 July 2012, he still had time to make the application inter partes since even then the caveat would only expire on 1 August 2012. Thus, on this ground alone the appeal could have been disposed in the appellants' favour (see paras 30–33).

(3) Further, the conduct of the respondent was contrary to that of a caveator, in that after lodging the private caveat he did not commence any court action against the estate of the late wife to enforce any of the proprietary claims as enumerated in s 323 of the NLC in respect of the land. Neither did he state in his affidavits supporting his application to extend the life of the caveat that he intended to commence any such action in the near future. The respondent's argument that the requirement to commence a court action timeously did not apply in the present case had no merit. This was because the lodging of a caveat was not an end in itself but just a temporary measure to preserve the caveator's claim to a proprietary right in respect of the land, pending determination of that claim by a court. As such, the order of the High Court in the present case was set aside (see paras 34–35).

I **[Bahasa Malaysia summary**

Pertikaian dalam kes ini berkisarkan sebidang tanah yang terletak di Rawang ('tanah tersebut'), yang dimiliki bersama oleh sepasang suami isteri. Suami dan isteri tersebut telah meninggal dunia tetapi masih wujud pertikaian di antara benefisiari-benefisiari kepada harta pusaka mendiang pemilik bersama

berhubung tanah tersebut yang telah berkesudahan dengan pemfailan guaman sivil di Mahkamah Tinggi KL. Responden telah mendakwa dia adalah benefisiari harta pusaka mendiang suami itu. Walau bagaimanapun, dia bukan pihak kepada guaman sivil itu. Sebaliknya, responden telah memasukkan kaveat persendirian berkaitan tanah tersebut untuk menyekat apa-apa urusan berkaitan hartanah yang dipertikaikan. Wakil peribadi harta pusaka mendiang isteri ('perayu-perayu tersebut') terkilan dengan kewujudan kaveat persendirian responden itu telah memohon menurut s 326(1) KTN untuk dibatalkan kaveat persendirian itu. Pada 28 Jun 2012, Pendaftar Hak milik telah menyampaikan ke atas responden sebagai pengkaveat satu notis Borang 19C ('notis tersebut') untuk pembatalan kaveat tersebut. Pada 5 Julai 2012, responden bertujuan untuk menggunakan s 326(2) KTN dan telah memfailkan saman pemula ex parte untuk melanjutkan hayat kaveat persendiriannya, yang akan tamat pada 28 Ogos 2012. Pada 18 Ogos 2012, Mahkamah Tinggi telah memberikan perintah ex parte melanjutkan hayat kaveat persendirian tersebut. Pada 17 Ogos 2012, perayu-perayu tersebut telah memfailkan permohonan inter partes untuk mengetepikan perintah ex parte tersebut. Permohonan inter partes telah ditolak dan justeru itu rayuan ini. Perayu-perayu tersebut berhujah bahawa permohonan di bawah s 326(2) KTN patut dibuat inter partes dan bahawa hanya dalam keadaan luar biasa permohonan tersebut boleh dibuat secara ex parte. Pemohon-pemohon juga berhujah bahawa tiada keadaan luar biasa dalam kes ini yang mewajarkan responden memulakan prosiding melalui permohonan ex parte. Responden berhujah bahawa terdapat keadaan yang luar biasa. Menurut responden notis tersebut yang telah disampaikan ke atas responden pada 28 Jun 2012 sebenarnya bertarikh 1 Jun 2012 dan bahawa tempoh untuk memohon lanjutan hayat kaveat persendirian dengan itu bermula dari 1 Jun 2012.

Diputuskan, membenarkan rayuan dengan kos RM10,000:

(1) Adalah undang-undang tetap bahawa permohonan di bawah s 326(2) KTN untuk melanjutkan hayat kaveat patut dibuat secara inter partes dan bukan ex parte kecuali terdapat keadaan kluar biasa. Beban undang-undang untuk membuktikan kewujudan keadaan luar biasa sebegitu terletak atas responden sebagai pengkaveat (lihat perenggan 26).

(2) Tiada apa-apa yang taksa dari segi undang-undang atau dalam notis Borang 19C ('notis tersebut') yang sebenarnya telah disampaikan ke atas responden. Undang-undang dan notis tersebut amat jelas. Kedua-duanya memperuntukkan bahawa tempoh dua bulan bermula dari tarikh penyampaian notis tersebut ke atas pengkaveat. Dalam kes ini, ia tidak dipertikaikan bahawa notis tersebut telah disampaikan ke atas responden pada 28 Jun 2012 dan oleh itu, responden mempunyai masa yang mencukupi (dua bulan) untuk membuat permohonan bagi melanjutkan hayat kaveat persendirian inter partes itu. Walaupun tempoh tersebut bermula dari tarikh notis tersebut iaitu 1 Jun 2012,

apabila responden memfailkan permohonan ex parte pada 5 Julai 2012, dia masih mempunyai masa untuk membuat permohonan inter partes oleh kerana kaveat tersebut hanya luput pada 1 Ogos 2012. Oleh itu, atas alasan ini rayuan tersebut boleh diselesaikan menyebelahi perayu-peryau tersebut (lihat perenggan 30–33).

(3) Selanjutnya, perilaku responden adalah bertentangan sebagai pengkaveat, di mana selepas memasukkan kaveat persendirian dia tidak memulakan apa-apa tindakan mahkamah terhadap harta pusaka mendiang isteri tersebut untuk menguatkuasakan apa-apa tuntutan hak milik sepertimana dinyatakan dalam s 323 KTN berkaitan tanah tersebut. Dia juga tidak menyatakan dalam afidavit sokongan dalam permohonannya untuk melanjutkan hayat kaveat tersebut bahawa dia berniat untuk memulakan apa-apa tindakan sedemikian dalam masa terdekat. Hujah responden bahawa keperluan untuk memulakan tindakan mahkamah memakan masa tidak terpakai dalam kes ini dan tidak mempunyai merit. Ini adalah kerana kemasukan kaveat tidak menamatkan sendiri tetapi hanya langkah sementara untuk mengekalkan tuntutan pengkaveat terhadap hak milik berkaitan tanah tersebut, sementara tuntutan tersebut ditentukan oleh mahkamah. Oleh itu, perintah Mahkamah Tinggi dalam kes ini diketepikan (lihat perenggan 34–35).]

Notes

For cases on private caveat, see 8(1) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 2577–2578.

Cases referred to

Eng Mee Yong & Ors v V Letchumanan [1979] 2 MLJ 212, PC (folld)
Hitchcock, Re (1900) 17 WN (NSW) 62 (refd)
Mexaland Development Sdn Bhd & Anor v Score Option Sdn Bhd & Ors [2008] MLJU 135; [2008] 8 CLJ 727, HC (refd)

Legislation referred to

National Land Code ss 323(1), 326(1), (1A), (1B), (2), Form 19C, First Schedule

Appeal from: Origination Summons No 24 (NCVC)-2180–08 of 2012 (High Court, Kuala Lumpur)

SH Leong (Thomas Philip) for the appellant.
Lim Koon Huan (Teoh Chooi Hui with her) (Skrine) for the respondent.

Mohd Hishamudin JCA (delivering judgment of the court):

INTRODUCTION

[1] This is an appeal against the decision of the High Court of Kuala Lumpur given on 8 November 2012.

[2] On 8 November 2012, the High Court of Kuala Lumpur had dismissed the appellants' application to set aside an ex parte order granted by the High Court to the respondent on 18 July 2012.

[3] The High Court ex parte order of 18 July 2012 was made pursuant to an ex parte originating summons (OS No 24(NCVC)-1740–07 of 2012) application to the High Court by the respondent seeking an extension of his private caveat that was due to expire on 28 August 2012 (in his supporting affidavit the respondent erroneously states the date of expiry of the private caveat to be '1 August 2012' — but this is a matter that will be discussed later in this judgment).

DECISION OF THIS COURT

[4] We, unanimously, have allowed this appeal with costs.

[5] We now give our grounds.

FACTS OF THE CASE

[6] On 23 February 2012, the respondent lodged a private caveat in respect of a piece of land, namely, a land held under title GRN 266860, Lot 803, Mukim of Rawang, District of Gombak, Selangor ('the disputed property'); thereby restraining any dealing in respect of the disputed property.

[7] This land is registered in the names of two co-owners, namely:

(a) Ong Ku @ Hong Poe (1/2 share); and

(b) Onn Kah Tiam (1/2 share).

[8] Both these registered co-owners have died. They were husband and wife. Ong Ku @ Hong Poe (the wife) died on 22 June 2009; whilst Onn Kah Tiam (the husband) died earlier on 14 September 2008.

[9] The respondent gives the following reasons for lodging the caveat. He claims to be a beneficiary of the estate of Onn Kah Tiam. He states that the late Onn Kah Tiam died leaving a will and naming the respondent as one of the beneficiaries under the will; that under the will his share in respect of the disputed property is '1/6'; that there is a dispute between the children of the deceased couple: those claiming to be the beneficiaries of the estate of Ong Ku @ Hong Poe on the one hand, and those claiming to be the beneficiaries of the

A estate of Onn Kah Tiam, on the other; culminating in a civil suit at the Kuala Lumpur High Court (High Court Kuala Lumpur Civil Suit No S-22–422 of 2010).

B **[10]** The respondent, however, is not a party to this civil suit (S-22–422 of 2010); but the personal representatives of the estate of Onn Kah Tiam are cited as the defendants in the civil suit.

[11] It is not disputed that after the lodging of the private caveat, the
C respondent did not commence any court action against the estate of Ong Ku @ Hong Poe to enforce any of the proprietary claims (if he has any) as enumerated in s 323(1) of the National Land Code ('the NLC') in respect of the disputed property. And neither does he state anywhere in his supporting affidavit (in applying to extend the life of his private caveat) that he intends to commence
D any such action in the near future.

[12] The appellants are the personal representatives (also the executors and trustees under the will of Ong Ku @ Hong Poe) of the estate of Ong Ku @ Hong Poe pursuant to a grant of probate. They are aggrieved by the presence of
E the respondent's private caveat in the title of the disputed property. They, accordingly, made an application pursuant to s 326(1) of the NLC to the registrar of title for the removal of the private caveat.

[13] On 28 June 2012 the registrar of title, pursuant to s 326(1A) of the
F NLC, served on the respondent (the caveator) with a Form 19C Notice for the removal of the caveat.

[14] Section 326(1A) of the NLC provides:

G

> (1A) On receiving any application for removal under this section, the Registrar shall —
>
> (a) serve upon the person or body at whose instance the caveat was entered a notice of intended removal in Form 19C; and
>
> H (b) make an endorsement on the register document of title that the notice in Form 19C has been served on the person or body at whose instance the caveat was entered and of the date of such service, and shall sign and seal the endorsement.

I **[15]** Under the NLC, once the Form 19C Notice is served on the caveator, the provision of s 326(1B) comes into operation: the caveat shall lapse and be of no effect at the expiry of two months (from the date of the service of the Form 19C Notice on the caveator), unless, before the expiry date, the registrar of title is served with an order of the court extending the life of the caveat.

[16] Section 326(1B) of the NLC provides:

> (1B) In the case in which a notice of intended removal in Form 19C has been served under subsection (1A), the caveat shall lapse and be of no effect at the expiry of two months specified in the notice unless before the expiry of that period the Registrar shall have been served with an order of the Court extending the time provided in the said notice.

[17] And s 326(2) of the NLC provides:

> (2) The Court may, on the application of any person or body on whom such a notice has been served under sub-section (1A) (and acting, if the circumstances so require, ex parte), from time to time extend the said period of two months; and the Registrar, on being duly served with an order of the Court under this sub-section, shall make an endorsement on the register document of title of the date of the service on him of the order and of the period of the extension, and shall sign and seal the endorsement.

[18] Now, upon being served with the Form 19C Notice, and purporting to invoke s 326(2) of the NLC, the respondent, on 5 July 2012, filed an ex parte originating summons (OS No 24(NCVC)-1740–07 of 2012) seeking to extend the life of his private caveat (which would expire on 28 August 2012 unless extended by an order of the court). The ex parte origination summons was never served on the appellants. So the appellants were never aware of the ex parte originating summons. The learned High Court judge, after hearing the ex parte application, on 18 July 2012, granted an ex parte order extending the life of the caveat 'until further order'.

[19] On 17 August 2012, the appellants filed an inter partes originating summons (OS No 24(NCVC)-2180–08 of 2012) applying to set aside the ex parte order of 18 July 2012 contending, among other grounds, that the respondent's ex parte originating summons (OS No 24(NCVC)-1740–07 of 2012), applying for the extension of the life of his private caveat, should not have been made ex parte; instead, in the circumstances of the case, it should have been made inter partes as there was no justification to make the application ex parte.

THE ORDER OF THE HIGH COURT

[20] On 8 November 2012, the appellants' inter partes originating summons application was dismissed; but the court made no order as to costs.

[21] Hence, the present appeal to the Court of Appeal.

THE GROUNDS OF JUDGMENT OF THE HIGH COURT

[22] In her grounds of judgment, the learned judge, after referring to the provision of s 326(2) of the NLC, states:

> Thus, pursuant to the above express provision of the NLC, and after hearing the oral submissions of learned counsel for the defendant, and in view of the urgent circumstances of the matter due to the pending 422 Suit (High Court of Kuala Lumpur Civil Suit No S-22–422 of 2010), on 18 July 2012 I allowed the defendant's ex parte application to extend the defendant's caveat.

[23] However, the learned High Court judge in her grounds does not explain what she meant by:

> in view of the urgent circumstances of the matter due to the pending 422 Suit (High Court of Kuala Lumpur Civil Suit No S-22–422 of 2010).

THE APPELLANTS' SUBMISSION

[24] Before us, Encik SH Leong, learned counsel for the appellants, submits that as a rule an application under s 326(2) of the NLC must be made inter partes; only in exceptional circumstances can the application be made ex parte. Learned counsel argues that there is nothing exceptional about the present case. Learned counsel cites the High Court case of *Mexaland Development Sdn Bhd & Anor v Score Option Sdn Bhd & Ors* [2008] MLJU 135; [2008] 8 CLJ 727 where the High Court, in interpreting s 326(2), held (at pp 98–99, paras [8]–[10]):

> [8] My interpretation of the above provisions is that, as a rule, the application must be made inter partes and not ex parte. The words in brackets:
>
> (and acting, if the circumstances so require, ex parte),
>
> in the above section, mean that only if the circumstances so require could the application be made ex parte. This implies that as a rule the application must be made inter partes and not ex parte. The applicant/caveator does not have a freedom of choice whether to proceed inter parte or ex parte. It is only in exceptional cases that he can make the application ex parte. This has to be the interpretation, for it would not be fair to the registered landowner/caveatee if the application to extend the caveat were to be made without his knowledge; when in the first place it was he who had applied to the land administrator/registrar (via s 326(1) and Form 19H of the National Land Code) for the caveat to be removed. The caveat, as long as it exists, affects his rights in dealing with his land (see s 322, sub-ss (2) and

(3) of the National Land Code). Under s 326 the applicant/caveator has two months to make the application to the court. Thus there is ample time given to him to take the necessary step to extend the life of his caveat.

[9] And when the caveator makes the application ex parte, instead of inter partes, he must explain his justification for doing so. It is mandatory for him to do so. The legal and evidential burden is on him. This is required by sub-s (2) of s 326, in particular, by the words:

> If the circumstances so require

[10] Therefore, in the application that is now before me, the question arises: Do the circumstances require the application by the first plaintiff to be made ex parte? I have examined the affidavit but I fail to find anywhere in the affidavit averments to explain and to justify as to why the application had to be made ex parte (instead of inter partes). Instead, what I do find is that the first plaintiff/applicant has had sufficient time to make the application inter partes after it was served with Form 19C on 21 May 2007.

THE RESPONDENT'S SUBMISSION

[25] Learned counsel for the respondent, Ms Lim Koon Huan, on the other hand submits that, although she agrees with the decision in *Mexaland Development* that as a rule the application must be made inter partes and not ex parte, nevertheless, she contends that there were exceptional circumstances in the present case that justify making the application ex parte. She argues that the respondent had only one month to make the application as the Form 19C Notice that was served on the respondent was dated 1 June 2012. She argues that time begins to run from this date, '1 June 2012', and not from the date of service of the Form 19C Notice on the respondent, that is, 28 June 2012.

THE GROUNDS FOR THE DECISION OF THIS COURT

[26] With respect, we find no merit in Ms Lim's argument. Firstly, we agree with the views of both counsel that the High Court in *Mexaland Development* correctly states the law as to the interpretation of s 326(2) of the NLC; that as a rule the application to the court to extend the life of the caveat must be made inter partes and not ex parte; and that only in exceptional circumstances can the application be made ex parte (the legal burden being on the applicant/caveator to satisfy the court that exceptional circumstances exist).

[27] Secondly, we find the provisions of the NLC to be clear as to when the two-month period begins. Section 326(1B) states:

> … the caveat shall lapse and be of no effect at the expiry of two months *specified in the notice* …. (Emphasis added.)

[28] Subsection (1B) states '… specified in the notice …'. So, we must examine the Form 19C Notice itself; what does the Form 19C Notice say. Now, Form 19C Notice as prescribed by the First Schedule to the NLC provides:

> Take notice that, in exercise of the powers conferred by section 326 of the National Land Code, I shall, at the expiry of the period of two months *from the date of service of this notice*, or of such further period (if any) as the Court may order, remove the caveat. (Emphasis added.)

[29] And the Form 19C Notice that was actually issued and served by the registrar on the respondent on 28 June 2012 states:

> Adalah diberi notis bahawa, pada menjalankan kuasa-kuasa yang diberi oleh Seksyen 326 Kanun Tanah Negara, saya akan, apabila habis tempoh dua bulan *dari tarikh penyampaian notis ini*, atau sesuatu tempoh yang lanjut (jika ada) sebagaimana yang diperintahkan oleh mahkamah, memotong kaveat itu. (Emphasis added.)

[30] Thus, as we see it, there is no ambiguity at all either in the law or in the notice that was actually served on the respondent. The law and the notice are crystal clear. The two-month period begins from the date of the service of the Form 19C Notice on the caveator.

[31] In the present case, it is not disputed that the Form 19C Notice was served on the respondent on 28 June 2012. This means that the respondent had ample time (two months) to make the application (to extend the life of the private caveat) inter partes.

[32] But even assuming for the moment (for the sake of argument) that time begins to run only from the date as stated in the Form 19C Notice, that is to say, '1 June 2012', still, when the respondent filed his ex parte application on 5 July 2012, he still had time to make the application inter partes instead of ex parte since the caveat would only expire on (hypothetically speaking) 1 August 2012.

[33] On the above ground alone it would be sufficient for us to dispose of the appeal in the appellants' favour.

[34] However, we would like to add that there is yet another reason as to why the extension order must be set aside. As we have pointed out at the earlier part of our judgment, in the present case, the respondent, after the lodging of the private caveat, did not commence any court action against the estate of Ong Ku @ Hong Poe to enforce any of the proprietary claims (if he has any) as enumerated in s 323(1) of the National Land Code (the NLC) in respect of the disputed property. And neither does he state anywhere in his supporting

affidavit (in applying to extend the life of his private caveat) that he intends to commence any such action in the near future. This conduct on the part of the respondent is contrary to the principle as laid down in *Eng Mee Yong & Ors v V Letchumanan* [1979] 2 MLJ 212 that a caveator, once he has lodged his private caveat against a particular piece of land, must take prompt action to enforce his claim in respect of the land in question. In *Eng Mee Yong* Lord Diplock, in delivering the judgment of the Privy Council, said (at p 215):

> So too in an application by the (caveatee) (sic) under s 327 for removal of a caveat, once the (caveator) (sic) has met the requirement of satisfying the court that the claim on which his caveat is based does raise a serious question to be tried, the balance of convenience would in the normal way and in the absence of any special circumstances be in favour of leaving the caveat in existence until proceedings, brought and prosecuted timeously by the caveator, for specific performance of the contract of sale which he alleges had been tried.

[35] Learned counsel for respondent, however, argues that the requirement to commence a court action timeously does not apply in the present case; and that it only applies in cases of sale and purchase agreements. With respect, we disagree with such a narrow application of the above principle as prescribed by *Eng Mee Yong*. No person should be allowed to lodge a caveat over another person's land and, thereafter, just sit back and do nothing to enforce any claim to the proprietary right that he alleges he has in respect of the caveated land (for example, a claim to title; or, a claim to a registrable interest). That would not be fair to the landowner who, while the caveat exists, is prohibited from dealing with his land. The lodging of a caveat is not an end in itself; it is just a means, a temporary measure, to preserve the caveator's claim to a proprietary right in respect of a land, pending determination of that claim by a court. In *Eng Mee Yong* Lord Diplock said (at p 214):

> The caveat under the Torrens system has often been likened to a statutory injunction of an interlocutory nature restraining the caveatee from dealing with the land pending the determination by the court of the caveator's claim to title to the land, in an ordinary action brought by the caveator against the caveatee for that purpose.

[36] And, in an Australian case, the caveat has been described as 'nothing more than a statutory injunction to keep the property in status quo until the court has had an opportunity of discovering what are the right of the parties' (per Owen J in *Re Hitchcock* (1900) 17 WN (NSW) 62 at p 63).

[37] We, therefore, set aside the order of the High Court; and we granted the reliefs as prayed for in the appellants' originating summons.

[38] Appeal allowed with costs of RM10,000 to the appellants.

Appeal allowed with costs of RM10,000.

Reported by Kohila Nesan